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IN THE

Supreme Court of the United States

October Term, 1956.

No. ~~1049~~ 156

CONSTANCE A. STOPPER,

Petitioner,

v.

THE MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Constance A. Stopper, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered January 31, 1957, which reversed the judgment of the United States District Court for the Eastern District of Pennsylvania in favor of the Plaintiff with instructions to enter judgment for the Defendant.

OPINIONS BELOW.

The opinion of the District Court of the United States for the Eastern District of Pennsylvania has not been reported. The opinion of the United States Court of Appeals for the Third Circuit is officially reported in 241 F. (2d) 465. The opinions of the District Court and the Court of Appeals are set forth in the appendix herein at pages 15-24 incl.

JURISDICTION.

(a) The judgment of the United States Court of Appeals for the Third Circuit was entered on January 31, 1957.

(b) The petition of the plaintiff for a re-hearing was denied on March 5, 1957.

(c) The jurisdiction of this Court is invoked under the provisions of the Act of June 25, 1948; 62 Stat. 928; 28 U. S. C., Sec. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

1. Did not the Circuit Court of Appeals, in directing the verdict in favor of the defendant, re-examine the facts and deprive the plaintiff of her right to trial by jury, in violation of the Seventh Amendment to the United States Constitution?

2. Did not the Circuit Court of Appeals in directing a verdict in favor of the defendant in this case, so misapply the law of Pennsylvania, as to reach a result directly contrary to that which would have been reached in the Pennsylvania Courts?

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED.

1. The Constitutional provision involved in this case is the Seventh Amendment to the Constitution of the United States reading as follows:

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

2. The statutory provision involved in this case is the Rules of Decision Act, 28 U.S.C. Section 1652, which reads as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Court of the United States, in cases where they apply."

STATEMENT OF THE CASE.

The jurisdiction of the District Court was invoked on the basis of diversity of citizenship.

The plaintiff, Constance A. Stopper, sought to recover upon two policies of insurance issued on July 19, 1951, by the defendant, The Manhattan Life Insurance Company of New York, upon the applications dated July 13, 1951, in the total amount of $40,000.00 upon the life of Eugene A. Stopper, plaintiff's husband.

Stopper died on October 12, 1951, at the age of 66, of a heart attack. Demand was made upon the defendant for payment which was refused on the basis of alleged fraudulent misrepresentations made by the insured in his application.

The pertinent questions and answers in the application are as follows:

Part I, Question 7(b):

> "Is any application, or reinstatement pending or contemplated in any other company?" "No."

Part II: Question 13:

> "Have you been examined for, or made application to any life, health or accident insurance company, or have you any application pending, on which a policy has not been issued, or issued on a different basis than that originally applied for?" "No."

Part II, Question 16 (b):

"Have you suffered from any ailment or disease of the heart, blood vessels, or lungs?" "No."

Part II, Question 19:

"What other Physician or Physicians have you consulted or been treated by, within the last five years? (Give details below.)"

"Dr. Daniel Pearson, 1830 Delancey, Goes twice yearly to Dr. Pearson for physical examination. No illness."

The defendant introduced Dr. Pierson's records in evidence which showed that the deceased made six visits to the doctor between May 3, 1951 and July 13, 1951, the date of the application. These visits covered a period of ten weeks prior to the application.

On May 3, and on June 11, 1951, the insured complained of epigastric discomfort.

For a period of seven weeks or until June 21, 1951, the doctor gave no prescription except Thiamine Chloride (Vitamin B_1) and stopping of coffee in the morning.

For the first time on June 21, 1951, the doctor prescribed nitroglycerin and aminophylline as a trial therapy "for the syndrome of pain, epigastric, precordial and arm." (38a, 40a)

The doctor never told the insured to cease work or to slow down his activities (40a).

At no time did the doctor ever tell the insured that he had a heart condition or any other serious disorder (39a).

The doctor admitted that the insured had a past history of epigastric discomfort (35a). Defendant knew of this from the Dominion Life Insurance file (79a).

This testimony was presumably the basis for the jury's conclusion that Stopper considered his visits to the doctor during May and June of 1951, to be for a recurrence of this non-serious disorder.

The testimony on behalf of the plaintiff disclosed that the insured, a prominent architect, worked an average of 16 hours a day during the year 1951, continuing up to the very date of his death, was healthy and energetic, never made any complaints about his physical condition (69a), the only medicine he took was for stomach distress (70a), and during the summer of 1951 made plans for a trip to Europe in the fall (73a).

There was testimony that Stopper first applied for insurance in various companies in February, 1951, long before the visits to his Doctor. This insurance was in furtherance of a partnership formed with Gilboy and O'Malley and the record discloses that these two policies were originally made payable to the other two partners. Only after Stopper's death, were the policies assigned to the plaintiff in settlement of the partnership affairs.

On the question of pending applications, the defendant introduced testimony that the insured signed an application with Pan American Insurance Company on June 5, 1951, that was never issued.

The plaintiff introduced testimony by Stopper's insurance broker, Weaver, that some applications were signed in blank (60a), and that he, the broker, never told Stopper about the status of the Pan American application (61a), and that no further action was taken on this application merely because the Company was too slow in its processing (63a).

The trial judge submitted the case to the jury on the basis that there was a conflict of evidence on all three issues:

(a) Knowledge of heart condition;

(b) bad faith in the negative answer concerning pending applications;

(c) whether Stopper knew he was being treated for a serious condition.

The trial judge charged the jury that if Stopper knew he had a heart condition and concealed it from the insurance company, there should be a verdict for the defendant.

The trial judge also left to the jury, the question of whether under all the circumstances, the insured acted in good faith in answering the question as to other insurance applications.

On the question of the doctor's visits, the trial judge charged that it is not a fraud under the law of Pennsylvania to fail to disclose every visit to the doctor if, in the opinion of the insured, it was for some trivial matter.

The jury returned a verdict in favor of the plaintiff in the amount of $40,000.00 with interest from October 12, 1951 to November 4, 1955.

The Circuit Court of Appeals reversed and directed the entry of judgment for the defendant, on the ground that it could be inferred as a matter of law, from the number of visits to the doctor and the treatments prescribed, that Stopper knew he was being treated for a serious disorder, and on the additional ground that the negative answer to the question of pending applications, was fraudulent, whether or not such answer was material to the risk.

REASONS FOR GRANTING WRIT.

1: The Circuit Court of Appeals Did Not Follow the Applicable Law of Pennsylvania.

The Circuit Court of Appeals directed a verdict for the defendant by inferring as a matter of law, knowledge by Stopper of his serious condition from the six visits to the doctor and the treatment prescribed. That the Circuit Court of Appeals did so is clear from its opinion (Appendix, pages 18-19):

> "In our judgment the character of these symptoms, their frequent recurrence and the steps taken by the attending physician were such that no rational person in Stopper's position could have regarded this recent medical history as too inconsequential to report to an insurance company concerned with the application of a 66 year old man for life insurance."

This was in direct conflict with the law of Pennsylvania as set forth in the case of *Burton v. Pacific Mutual Life Insurance Co.*, 368 Pa. 613, 84 A. 2d 310 (1951), wherein the Supreme Court of Pennsylvania upon facts much more susceptible to such inferences stated on page 615:

> "The evidence discloses beyond any doubt that Burton was suffering from an incurable cancer of the throat at the time he applied to defendant for insurance. Obviously, he was not in good health at that time and he was being treated for more than defective tonsils. However, there is absolutely no evidence that he knew his answers to those questions were false. Defendant seeks to have us infer knowledge from the long course of treatment and the medical records. This we cannot do under the facts here presented."

As a result of this misconception of Pennsylvania law, the Circuit Court of Appeals brushed aside the very facts

in this case, such as long hours of work, plans for the future, belief that the treatments were for previous stomach trouble and non-disclosure by the doctor to insured of his heart condition, which the Supreme Court of Pennsylvania approved as a basis for the finding of the jury that Burton did not realize that anything was seriously wrong with him, even though he had been to a doctor, whose name he did not reveal, twenty-eight times for X-ray treatments for a cancerous growth in his throat.

These mistakes made by the Circuit Court of Appeals were premised upon a misinterpretation of the basic principle as set forth in the leading case of *Evans v. Penn Mutual Life Insurance Co.*, 322 Pa. 547, 186 Atl. 133 (1936).

The Circuit Court of Appeals concluded that a knowingly false statement by an applicant establishes a conclusive presumption of fraud which permits no evidence to the contrary. Such conclusion which is directly contrary to the law of Pennsylvania is set forth in its opinion (Appendix, page 21):

> ". . . the knowledge of the insured that he is making a false statement itself establishes the bad faith on the basis of which a verdict *must* be directed." (Emphasis supplied.)

But the law of Pennsylvania is only that such evidence raises a presumption of fraud, which may be contradicted, rebutted, or explained by other evidence, and on which a verdict *may* be directed only if there is no evidence to the contrary.

The actual quotation from the case of *Evans v. Penn Mutual Life Insurance Co.*, 322 Pa. 547, 186 Atl. 133 (1936) is as follows on page 560:

> "Where the statements are made representations, the insurer, to avoid the policy, must show they were false and insured knew they were false or otherwise acted in bad faith in making them. If such falsity and the requisite bad faith affirmatively appear from com-

pefent and uncontradicted documentary evidence, . . . a verdict may be directed for the insurer. But whenever disputed questions of fact are presented by conflicting evidence, whether documentary or oral, . . . the case must be submitted to the jury, subject to the trial court's power to award a new trial as often as in its sound discretion it may think the interests of justice require."

As an additional ground for directing the verdict the Circuit Court of Appeals held that the denial of other insurance applications was fraudulent, without regard to the materiality of the statement.

This holding is patently in direct conflict with the law of Pennsylvania, which states that "the materiality of the statement with regard to the risk involved is a relevant matter for consideration in determining whether a false statement is made with intent to deceive". *Evans v. Penn Mutual Life Insurance Co.*, 322 Pa. 547, 186 Atl. 133 (1936).

Where there has not been a rejection of the risk, the negative answer is immaterial, and such immateriality makes the good faith of the insured, in so answering, a question of fact and not of law which must be decided by a jury.

In accord with this principle, the Supreme Court of Pennsylvania has never declared a negative answer as to other insurance applications fraudulent, as a matter of law, unless there actually was a rejection or a classification as a substandard risk. Therefore, this conclusion of the Circuit Court of Appeals was clearly erroneous particularly since there was ample evidence to support the jury's finding either that Stopper was unaware of the pending application, or that it had been abandoned and therefore was not pending.

Finally, the Circuit Court of Appeals has disregarded the distinction made by the Supreme Court of Pennsylvania

between the cases in which the insured concealed either hospitalization or the names of one or more doctors that treated him and those in which the insured, just as in the instant case, disclosed hospitalization and the name of the doctor or doctors that treated him and failed to give all the details. In only the first class of cases has the Supreme Court of Pennsylvania ever upheld a directed verdict for the insurer.[1]

Since the Circuit Court of Appeals failed to follow the law of Pennsylvania, a situation is presented which warrants this Honorable Court in granting the Writ of Certiorari as it has done on many occasions.

Erie R. Co. v. Tompkins, 304 U. S. 64; 82 L. ed. 188, 58 S. C. 817 (1938);
Guaranty Trust Co. v. York, 326 U. S. 99; 89 L. ed. 2079, 65 S. C. 1464 (1946);
Gibson v. Phillips Petroleum Co., 352 U. S. 874, 1 L. ed. 2d 77, 77 S. C. 16 (1957);
See also *Rules of Decision Act*, 28 U. S. C. Sec. 1652.

2. The Circuit Court of Appeals Deprived the Plaintiff of Her Right to Trial by Jury Contrary to the Seventh Amendment to the United States Constitution.

While recognizing that under Pennsylvania law, the issue in the case was whether the insured knew he was being treated for a serious condition, since all cases hold

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1. It is to be noted that in all six cases cited by the Circuit Court of Appeals in its opinion, as authority for the directed verdict, there was a concealment of hospitalization or the names of one or more doctors that treated the insured. As an example of the second class of cases, into which the instant case falls, are the following:

Travelers Insurance Co. v. Heppenstall Co., 360 Pa. 433, 61 A. 2d 809 (1948);
Baer v. State Life Insurance Co., 256 Pa. 177, 100 Atl. 755 (1917).

that the actual existence of a serious disease is immaterial[2] if the insured has no knowledge thereof, the Circuit Court of Appeals as noted above, erroneously inferred such knowledge as a matter of law from the record of the visits to the doctor and the treatment prescribed.

The Circuit Court of Appeals compounded this error by discussing in its opinion only those facts favorable to the defendant and ignoring those favorable to the plaintiff, in direct violation of the precept of this Honorable Court in *Wilkerson v. McCarthy*, 336 U. S. 53, 57, 93 L. ed. 497, 502, 69 S. Ct. 413 (1949):

> "In passing upon whether there is sufficient evidence to submit an issue to a jury, we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given."

It is clear that the plaintiff has been deprived of the right to trial by jury in violation of the Seventh Amendment to the United States Constitution, unless the inferences drawn by the jury were "without support in the evidence". *Tennant v. Peoria and P. U. R. Co.*, 321 U. S. 29, 35, 88 L. ed. 520, 525, 64 S. Ct. 409 (1944).

The finding of the jury that Stopper did not realize he was being treated for anything serious, is certainly supported by the evidence that he had a past history of stomach trouble (35a, 38a)) that his complaints during May and June of 1951 were of epigastric discomfort (Doctor's record, Appendix pages 19-20), that for seven weeks, the only prescription given to him was Vitamin B_1 and advice to stop coffee in the morning, that the doctor pre-

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2. *Evans v. Penn Mutual Life Insurance Co.*, 322 Pa. 547, 186 Atl. 133 (1936), *Burton v. Pacific Mutual Life Insurance Co.*, 368 Pa. 613, 84 A. 2d 310 (1951), *Adams v. Metropolitan Life Insurance Co.*, 322 Pa. 564, 186 Atl. 144 (1936), *Travelers Insurance Co. v. Heppenstall Co.*, 360 Pa. 433, 61 A. 2d 809 (1948).

scribed nitroglycerin for the first time on June 21, 1951 only three weeks before the signing of the application as a trial therapy, "for the syndrome of pain, epigastric, precordial and arm" (38a, 40a), that during 1951, he worked 16 hours a day as an architect until the day of his death (53a-55a) and made plans for a trip to Europe later in the fall of 1951 (73a).

Certainly it was reasonable for the jury to infer from such evidence that Stopper believed that nothing was seriously wrong with him other than a recurrence of his old stomach trouble, particularly since the doctor never told him that he had heart trouble or that he should slow down (39a, 40a).[3]

In deciding, as a matter of law, that Stopper knew something was seriously wrong with him, the Circuit Court of Appeals has charged him with greater knowledge than his own doctor, who only suspected a heart condition three weeks before the application and never told Stopper of his suspicions.

In addition, the evidence that Stopper's application revealed the name of his doctor, that he had had an electrocardiogram taken and authorized the defendant to consult his doctor, warranted the jury's conclusion that he acted in good faith.

The finding of the jury that Stopper acted in good faith in answering the question of other insurance applications is supported by the evidence that his agent, Weaver, who was processing his insurance applications never mentioned the status of the Pan American application (62a, 63a), that Stopper knew nothing of the status of various applications (62a, 63a) that Weaver never paid any attention to the Pan American application because the company was slow in acting (63a), that Weaver had Stopper sign

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3. The Supreme Court of Pennsylvania approved similar findings of the jury in the case of *Burton v. Pacific Mutual Life Insurance Co.*, 368 Pa. 613, 84 A. 2d 310 (1951).

some applications in blank (59a) and that this application had never been rejected (17a).

The jury was certainly entitled to find that Stopper, not knowing the status of his various insurance applications answered this question in good faith, particularly since no fraudulent motive could be attributable to his negative answer. What would an affirmative answer have revealed, other than the fact that another insurance company was seeking Stopper as a policy holder? This immateriality clearly made the good faith of the answer a factual issue, solely for the jury.

Since the evidence amply supports the verdict of the jury, it is clear that the Circuit Court of Appeals disagreed with their findings and substituted its own conclusions of fact. Its entire opinion reveals the attempt to support by evidence from the record its own factual conclusions. That prerogative belongs exclusively to the jury under the Seventh Amendment, as this Honorable Court has noted in *Rogers v. Missouri P. R. Co.*, 352 U. S. 500, 1 L. ed. 2d 493, 498, 77 S. C. 443 (1957):

> "We may assume that the jury could properly have reached the Court's conclusion. But, as the probative facts also supported with reason the verdict favorable to the petitioner, the decision was exclusively for the jury to make."

The invasion by the Circuit Court of Appeals of the province of the jury in this case clearly warrants the granting of the Writ of Certiorari, just as did similar action of other Courts of Appeals and the Supreme Court of Missouri in the following cases:

Rogers v. Missouri P. R. Co., 352 U. S. 500, 1 L. ed. 2d 493, 77 S. C. (1957);

Webb v. Illinois Central R. Co., 352 U. S. 512, 1 L. ed. 2d 503, 77 S. C. 451 (1957);

Ferguson v. Moore McCormack Lines, 352 U. S. 521, 1 L. ed. 2d 511, 77 S. C. 457 (1957);
Gibson v. Phillips Petroleum Co., 352 U. S. 874, 1 L. ed. 2d 77, 77 S. C. 16 (1957).

3. The Questions Here Presented Are Important and of Far-Reaching Effect.

There are millions of people in the State of Pennsylvania alone, who have taken out insurance policies. It is imperative that all such policy holders be treated alike. Their rights to receive the proceeds should be governed by the rules laid down by the Supreme Court of Pennsylvania, whether their companies are domestic or foreign corporations. The institution of suit in the United States District Court rather than in the State Court should not change that right. There must be one set of rules for both forums.

The action of the Circuit Court of Appeals in setting its own standards to determine the fact of misrepresentation, instead of following the law of the State Forum, cannot be allowed to stand.

CONCLUSION.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

AND NOW, to wit, this 28th day of February, 1956, upon consideration of defendant's motion for a directed verdict and defendant's motion for a new trial, briefs submitted and oral argument had thereon, and it appearing to the Court that under the evidence adduced at trial the questions of whether or not the deceased had acted in good faith in answering the questions in his application for insurance as to prior visits to a doctor, whether or not he had answered truthfully the question as to other insurance applications, and whether or not he was aware of the fact that he was then suffering from a heart condition, were required under said evidence to be submitted to the jury; further, there appearing no substantial trial errors in the admission of evidence or mistakes of law in the charge of the Court which would warrant the granting of a new trial, Evans v. Penn Mutual Life Ins. Co. of Phila.; 322 Pa. 547 (1936); Travelers Ins. Co. v. Heppenstall Co., 360 Pa. 433 (1948); Burton v. Pacific Mutual Life Ins. Co., 368 Pa. 613 (1951); Croll v. John Hancock Mutual Life Ins. Co., 198 F. 2d 562 (3rd Cir. 1952), it is

ORDERED, ADJUDGED AND DECREED that defendant's motions for judgment in its favor and for a new trial be and they are hereby DENIED.

By THE COURT:

/s/ THOMAS J. CLARY

J.

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 11,897

CONSTANCE A. STOPPER

v.

THE MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued September 27, 1956

Before BIGGS, *Chief Judge*, GOODRICH and HASTIE, *Circuit Judges.*

Opinion of the Court.

(Filed January 31, 1957)

HASTIE, *Circuit Judge.*

This is an action under diversity jurisdiction, upon two insurance policies issued July 19, 1951 by the Manhattan Life Insurance Company, a New York corporation, on the life of Eugene Stopper, a Pennsylvanian. The

insured died of a heart attack on October 12, 1951. The insurer denied liability, except for return of premiums, on the ground that Stopper had made fraudulent misrepresentations in his applications for insurance, dated July 13, 1951. Trial to a jury resulted in a verdict for the plaintiff in the full amount of the policies. Judgment was entered on this verdict after the trial judge denied defendant's motion for judgment in accordance with its earlier timely motion for a directed verdict. This appeal followed.

The appellant urges that the court below erred in leaving to the jury the decision whether certain unquestionably false statements in the insurance applications were of such fraudulent character as to vitiate the policies thus obtained. The parties properly recognize that this issue is to be resolved in accordance with Pennsylvania law, since this is a diversity case brought in a district court in Pennsylvania. *Croll v. John Hancock Mut. Life Ins. Co.*, 3d Cir. 1952, 198 F.2d 562.

The applications for insurance contained the following questions and answers upon which insurer rests its claim of fraudulent misrepresentation:

> "Part 1 . . .
>
> ". . . .
>
> "7(b). Is any application or reinstatement, pending or contemplated in any other company? (Give details).
>
> "[Answer] No".
>
> "Part 2 . . .
>
> ". . . .
>
> "13. Have you ever been examined for or made application to any life, health, or accident insurance company or have you any application pending on which a policy has not been issued . . . ?
>
> "[Answer] No.".

"

"16(b). Have you ever suffered from any ailment or disease of the Heart, Blood Vessels or Lungs?

"[Answer] No."

"

"19. What . . . Physician or Physicians have you consulted or been treated by, within the last five years? (Give details below).

"[Answer] Dr. Daniel Pearson [sic] 1830 Delancey.

Goes twice yearly to Dr. Pearson for physical examinations—No illness."

The insured also certified that he had read the answers to the questions in Part 1 and Part 2 before signing and that they had been "correctly written as given by me, and are full, true and complete and there are no exceptions to any such answers other than stated herein."

Undisputed documentary evidence establishes the basic facts concerning Stopper's answer to the last of the foregoing questions, the inquiry about medical consultations and treatments during the last five years. In answering that question Stopper reported his routine semi-annual physical check-ups by his personal physician Dr. Pierson, but saw fit to omit any mention of six unusual visits to his personal physician since the last semi-annual check-up and within the ten weeks immediately preceding his application to Manhattan for life insurance. Indeed, one such medical visit was made only two days before the execution of the insurance application and an appointment was then made for another visit which occurred the very day of the insurance application. On these occasions he reported distress and discomfort suffered in connection with recurring and rather dramatic symptoms of malaise. In our judgment the character of these symptoms, their frequent recurrence and the steps taken by the attending physician were

such that no rational person in Stopper's position could have regarded this recent medical history as too inconsequential to report to an insurance company concerned with the application of a 66 year old man for life insurance. This conclusion is predicated upon and required by Dr. Pierson's written record of this patient's visits as introduced into evidence in this case. Because we regard that record as decisive, we set it out verbatim:

[Dr. Pierson's Clinical Record]

5-3-51 In Harrisburg three weeks ago walked about four blocks. After eating heavy dessert of some apple cake and had all gone feeling in epigastrium dyspnea and sweating requiring sitting to rest a while before going to a meeting. This occurred once since after walking. And mildly several times unassociated with activity except that during these three weeks things have been very busy and rather tense.

Blood Pressure 155/90 Heart O.K. at 76. No murmurs. Chest O.K. ECG. shows within N [i.e., normal]. Urine negative except for faint trace albumin. Rx Thiamine chloride 10 mgm. p.c.

5-28-51 X-ray of chest 5/26—Dilation and elongation of aorta. No cardiac enlargement. Conference with Mr. Weaver and Mr. —— cardiogram and x-ray report given them.

6-11-51 Epigastric discomfort, then precordial pain, sense of choking and dull heaviness left arm come shortly after breakfast and 1-2X last week at other times of day. Sounds like angina but doesn't accompany exercise, etc. Blood pressure 140/80. (Belched several times while here.) To stop coffee in A.M. and to get Master 2 step test at hospital.

6-14-51 E.C.G. and Master 2 step at Lankenau Hospital show slight S.T. sag in some of chest leads returning to N [i.e., normal] in 6 minutes. Has stopped coffee in A.M. and more comfortable tho has had small A.M. attack of short duration. Admits tension in new project. Recheck one week and Rx aminophylline if further symptoms.

6-21-51 Attack yesterday, shortly pt. lunch lasting about two hours. Then O.K. since. Feels some precordial discomfort today. Blood pressure 140/85. Heart regular 72. Rx. aminophylline gr. iii t.i.d [i.e., grains 3, 3 times daily]. Nitroglycerine grains 1/100 under tongue p.r.n. [if needed for pain].

7-11-51 In Cape May 10 days and felt well. Took nitroglycerin four times. Returned Philadelphia yesterday and had attack this A.M. requiring nitroglycerin. Blood pressure 140/85. Heart modal. Rx same and check in two days and consider Kehlen Therapy.

7-13-51 Has been better but still aware of precordial discomfort. Blood pressure 130/80. Heart physiologic. Rx. nitroglycerin p.r.n. [i.e., as needed]. Eskel 40 millograms. No. L. Start one at bedtime and build to 3 a day unless nausea.

To offset this record it has been argued to us that other evidence shows that Stopper may not have known that his symptoms indicated any heart ailment. If this argument has any validity, it is still beside the point. Stopper's six visits to his physician within a short period and the dramatic painful and recurring symptoms which he reported on these occasions are the clearest manifestations of his own realization that something out of the ordinary was wrong. And though Dr. Pierson may not have stated any particular diagnosis to the patient, the doctor's

prescriptions and the tests he ordered must have made it obvious to Stopper that the doctor was not dismissing the illness as inconsequential. We have not overlooked an additional contention that Stopper may have considered his symptoms no more than dispepsia which he had experienced previously. We simply think this suggestion cannot be squared with Dr. Pierson's record of what was said and done.

In addition, the fact that Stopper considered even his routine semi-annual visits to his physician for check-ups important enough to report on his insurance application makes it unthinkable that he could in good faith have ignored his six most recent and most unusual visits for treatment for recurring visceral pain, reporting instead, "no illness". Thus, on the documentary record alone we have a clear picture of willful misrepresentation in answer to Manhattan's inquiry about recent medical consultation and treatment.

Appellee's brief properly recognizes that under the law of Pennsylvania, as applicable to a case like this, the trial court should direct a verdict for the insurer "if the uncontradicted documentary evidence shows that statements in the application were false and that insured either knew they were false or otherwise acted in bad faith in making them." This principle is clearly stated in the much cited and often followed case of *Evans v. Penn Mut. Life Ins. Co.*, 1936, 322 Pa. 547, 186 Atl. 133. For present purposes it is noteworthy that under this authoritative doctrine the knowledge of the insured that he is making a false statement itself establishes the bad faith on the basis of which a verdict must be directed. This is such a case, since the documents in evidence make it clear that the insured must have known that he was withholding the more recent and significant part of the information requested concerning medical consultations and treatment while volunteering less current and significant data.

While each case in this area must depend upon its peculiar facts, we think the Pennsylvania decisions with reference to the withholding of information about recent medical visits indicate by analogy the propriety of directing a verdict for the insurer in the present case. Cf. *Kizirian v. United Benefit Life Ins. Co.*, 1956, 383 Pa. 515, 119 A.2d 47; *Freedman v. Mutual Life Ins. Co.*, 1941, 342 Pa. 404, 21 A.2d 81; *Reeder v. Metropolitan Life Ins. Co.*, 1941, 340 Pa. 503, 17 A.2d 879; *Bailey v. Pacific Mut. Life Ins. Co.*, 1939, 336 Pa. 62, 6 A.2d 770. Nor is *Burton v. Pacific Mut. Life Ins. Co.*, 1951, 368 Pa. 613, 84 A.2d 310, relied upon by appellee, inconsistent with this analysis. For there the insured did disclose visits to physicians in connection with a tonsilectomy, and the evidence permitted the conclusion that he was unaware that he had experienced anything beyond postoperative treatment consequential to that surgery. Moreover, this court, applying Pennsylvania law, has required a verdict for the insurer in cases rather similar to the one now on appeal. *Guardian Life Ins. Co. of America v. Clum*, 1939, 106 F.2d 592; *Croll v. John Hancock Mut. Life Ins. Co.*, 1952, 198 F.2d 562.

In summary, we find wholly applicable to the facts before us the statement of the Supreme Court of Pennsylvania in *Freedman v. Mutual Life Ins. Co. of New York, supra*, at 409, 21 A.2d at 84:

> "... Thus, where it is established by uncontradicted documentary evidence that the insured has consulted physicians so frequently, or undergone medical or surgical treatment so recently, or of such a serious nature, that a person of ordinary intelligence could not have forgotten these incidents in answering a direct and pointed question in an application for insurance, bad faith may be inferred as a matter of law if the insured denies in his answer that any physician has been consulted, or any medical or surgical treatment has been received during the period of inquiry."

While the knowingly false statement of the insured concerning the nature and frequency of his recent visits to Dr. Pierson was in itself a sufficient ground for directing a verdict for the insurer, we find it equally clear that Stopper made a willfully false statement in answer to an inquiry about other insurance applications. It will be remembered that question 13 in Part 2 of the Manhattan application read as follows: "Have you ever been examined for or made application to any life, health or accident insurance company or have you any application pending on which a policy has not been issued?" Stopper's answer was "No". The falsity of this statement is proved by a document in evidence in this case, namely, an application to the Pan American Life Insurance Company for life insurance in the amount of $50,000 signed by Stopper and dated June 5, 1951, on which, admittedly, no policy had been issued. Standing alone this document would suffice to establish Stopper's awareness of a circumstance he was required to disclose in this Manhattan application executed five weeks later on July 13, 1951.

In an effort to excuse Stopper's failure to disclose this Pan American application, plaintiff below introduced evidence that Stopper had needed $100,000 of life insurance for business purposes and, with that in view, had signed various but unspecified insurance applications in blank. This is said to provide a basis for a permissible inference that the Pan American application was one of those signed in blank and that Stopper did not know of the submission of the Pan American application when he executed his subsequent application to Manhattan. This argument fails because it ignores Part 2 of the Pan American application which lists answers given by Stopper to the medical examiner of the Pan American Insurance Company concerning his medical history. It appears on the face of the document, and by corroborating testimony as well, that Stopper executed this portion of the application in the presence of the Pan American medical examiner on June 5, 1951. On the

record, therefore, Stopper's denial that he had "ever been examined for or made application to any life, health or accident insurance company" without obtaining a policy or that he had "any application pending on which a policy has not been issued . . ." must stand as willfully false. The question was in alternative form and he must have realized that the Pan American application was covered by at least one of the stated alternatives. Cf. *Blough v. Modern Woodmen of America*, 1946, 159 Pa. Super. 249, 48 A.2d 37; *Matovich v. Mut. Benefit Health & Accident Ass'n.*, 1945, 157 Pa. Super. 604.

It is our conclusion that the documentary evidence so palpably disclosed the perpetration of a fraud upon the insurer that the direction of a verdict for the defendant was the only course consistent with law and justice. We are confident that the courts of Pennsylvania would reach the same conclusion on these facts.

The judgment will be reversed with instructions to enter judgment for the defendant.

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 11,897.

CONSTANCE A. STOPPER

v.

THE MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: BIGGS, *Chief Judge*, GOODRICH and HASTIE, *Circuit Judges.*

Judgment.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed with instructions to enter judgment for the defendant. With costs.

Attest:

IDA O. CRESKOFF
Clerk

January 31, 1957

APPENDIX D.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 11,897.

CONSTANCE A. STOPPER

v.

THE MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK,

Appellant.

SUR PETITION FOR REHEARING

Present: BIGGS, *Chief Judge*, GOODRICH and HASTIE, *Circuit Judges*.

Order.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By THE COURT:

WILLIAM H. HASTIE,
Circuit Judge.

Dated: March 5, 1957